

“This Country has Laws”: Legalism as a Tool of Entrenching Autocracy in Egypt

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Abstract

This article investigates the role of legalism and legal processes in entrenching autocratic rule in post-revolution Egypt. In the aftermath of the spectacular street protests that swept Egypt, the movement for change was channeled into legal challenges handled by the legal system and judicial experts. This judicialization of politics ensured that an emerging autocrat could not only use the judiciary and the legal system to control the process of democratic transition but also reverse it. In examining the rise of autocratic rule in post-revolutionary Egypt, this article illustrates how the legal system, constitutionalism, law-making, and electoral politics became integral pawns in the consolidation of an illiberal agenda. Legalistic strategies, such as rewriting electoral laws, reforming judicial regulations, strengthening presidentialism, rewriting and amending the constitution, and other legislative reforms, enable the rise of autocratic legalism in the country. As the case of Egypt illustrates, autocratic legalism is a dangerous mode of entrenching autocratic rule that uses the legal system to reach power and then abuses the same legal processes to ensure no one can challenge the power capture. Although elections, parliaments, and judiciaries remain in place to maintain a façade of legality, they are increasingly captured by the executive within a context of growing policing, and restrictions on freedoms and rights.

Keywords

autocratic legalism, authoritarianism, rule-of-law, democracy, pluralism, middle east and north Africa

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Introduction

In April 2016, the government of Egypt signed a maritime border agreement with the Kingdom of Saudi Arabi, in which it ceded the Red Sea islands of Tiran and Sanafir to the Saudi side. The transfer of the two islands in the Gulf of Aqaba were met with public anger, which transformed into widespread street protests and a series of court challenges. A few days after the announcement of the transfer, human rights- and activist lawyers took the case to court, thus starting a series of litigations challenging the legality of the maritime agreement on various grounds.¹ In parallel, activists nationwide called for protests against the agreement, which were met by hundreds of police arrests nationwide over the following months.² After prolonged legal battles, and multiple court rulings nullifying the agreement, the parliament voted in favor of upholding the agreement. Soon after, a Supreme Constitutional Court (SCC) ruling suspended all previous verdicts on the agreement (including those by the Supreme Administrative Court), and finally validated the agreement. In the meantime, President El-Sisi had already signed the controversial agreement with Saudi Arabia into effect, giving the Kingdom sovereignty over the two islands at the mouth of the Gulf of Aqaba.³ The islands' dispute marked a crucial moment in Egyptian politics, symbolizing a turning point for the relationship between the autocratic- and the legal systems in post-2011 Egypt. The multiple court rulings nullifying the agreement were arguably an embodiment of the *last* clash of the judiciary with the executive. Afterall, judges who dared rule on the annulment of the islands' agreement, thus disobeying the president's orders, were soon after dismissed, moved, or denied promotions.⁴ This led several observers to dub the aftermath of the Tiran and Sanafir case as a *judicial massacre*, thus evoking the 1969 *massacre of the judiciary*, in which ex-president Gamal Abdel Nasser punished and dismissed over a hundred of sitting judges as a result of the judges' vocal criticism of his regime.⁵ The islands' dispute not only ended any semblance of judicial independence in a country that had thus far prided itself on the independence of its judicial institutions, but it also crystallized a new mode of autocratic entrenchment through the legal system, what scholars have come to term *autocratic legalism*.

When Autocracy and Legality Intersect

Law and legality have become a tool of entrenching autocratic rule on a global level. In the last decade, the world has witnessed the ascension of several charismatic leaders to power through constitutional and democratic avenues, from Brazil and Venezuela to Turkey, and from Egypt to Hungary and Poland.⁶ Markedly, although these leaders came to power at the heels of constitutional mechanisms, in all the various cases they have worked to dismantle the same mechanisms that brought them to power. Initially, this might seem reminiscent of Hitler's election in Germany in 1933 through democratic elections, and his subsequent dismantling of Germany's constitutional republic. Hitler's political party⁷ won the 1932 parliamentary elections and gained a majority in the Reichstag, leading to Hitler's 1933 appointment as Chancellor by President Paul von Hindenburg. Soon thereafter, Hitler passed the Enabling Act in March 1933,⁸

which effectively granted him unchecked powers, thus allowing him to dismantle democratic institutions, including the media, the judiciary, and the parliament, while eliminating political parties, and enabling him to suppress opposition and override individual rights and freedoms in the name of national interest. Ultimately, the chancellor was able to swiftly establish a totalitarian regime out of what was a democratic Weimar Republic. But there is one key distinction that sets apart Hitler's autocracy, and much of the 20th century dictatorships, from many contemporary legalistic autocrats. Hitler and other 20th century dictators, such as Joseph Stalin in the former Soviet Union, Benito Mussolini in Italy, and Pol Pot in Cambodia, challenged pluralism, elections, democratic institutions, and constitutionalism, and their rule was firmly based not on notions of legality, but rather on ideological foundations and charismatic leadership. Contemporary autocrats, on the other hand, fully embrace notions of legality, elections, constitutionalism, and even claim to be establishing democratic rule. Their autocracy is supported through law and legal institutions, including the judiciary, parliament, and the constitution. Contemporary autocrats elected through democratic institutions entrench their rule by dismantling checks and balances, loosening guarantees of free and democratic elections, and challenging liberal freedoms such as freedom of speech and expression, including the right to protest and strike. They do so by rewriting constitutions, packing courts with aligned judges, appealing to majoritarianism to violate minority rights, and restricting judicial, media, and parliamentary independence.⁹ Therefore, autocratic legalism has come to be defined as the phenomenon "when electoral mandates plus constitutional and legal changes are used in the service of illiberal agendas."¹⁰ Or as Corrales succinctly defines it, "the use, abuse, and non-use (in Spanish, *desuso*) of the law in service of the executive branch."¹¹ In this way, the toolkit of Egypt's military take-over in 2013 is very different than that of the military's take over in 1952. Although the shift to autocracy in 1952 banned political parties, restricted freedoms and rights in the name of national interest, and concentrated power in the hands of the charismatic president Nasser, al-Sisi's rise to power counted on a judicial capture, rewriting the constitution, control over the parliament, and legal revisions that consolidated power and ensured that the same democratic processes that enabled al-Sisi's election would not be available to enable another free election.

What explains the transformation of autocracy from its mid-century articulation, to its contemporary expression through autocratic legalism? This is an especially urgent question considering that the period 2016 to 2020 "finds more countries moving in an authoritarian direction than a democratic direction the most since the third wave of global democracy in the 1970s."¹² Although there are multiple and complex changes and continuities to the geopolitical global order, one critical transformation has been the rise of neoliberalism, an ideological and political project that sits easily with authoritarianism. The "convergence between neoliberalism and authoritarianism, where neoliberalism necessitates measures such as restricting dissent and crushing movements" (Khalil & Dill, 2018, p. 578) is a critical aspect of contemporary autocratic legalism. Neoliberalism refers to the "national and transnational political project of deregulation, privatization, financialization, austerity and commodification" in which the state is expected to intervene minimally, and to do so only to protect the

interests of capital.¹³ The intersection of neoliberalism and authoritarianism thus represents a complex and often troubling fusion of political and economic ideologies. In this convergence, governments employ authoritarian tactics to preserve and promote widely unpopular neoliberal economic policies. This can manifest through the banning of protests and the restriction of dissenting voices, effectively stifling opposition while maintaining a facade of liberalism and stability. This new form of “authoritarian neoliberalism can be observed in a wide range of states, including Nicaragua, the United States, India, Brazil, China, Iran, the Philippines, Poland, Russia, Hungary, Cameroon, Gabon, and Kazakhstan.”¹⁴ By curbing civil liberties while maintaining a façade of legality, such regimes aim to safeguard the interests of the capitalist class, as “anti-neoliberal popular resistance”¹⁵ threatens the unbridled accumulation of wealth and power. This collusion also empowers corporations and wealthy elites by dismantling regulations, privatizing state assets, and favoring market-driven policies.¹⁶ Consequently, populations face a dual burden: not only do they bear the brunt of economic inequality and social disparities perpetuated by unfettered capitalism, but their freedoms are also curtailed, thus leaving them unable to challenge such dispossession. The collusion of neoliberalism and authoritarianism is made possible through frameworks of legality. Law-and-order tactics are a “regular feature of neoliberalism to exercise control over marginalized social groups,” especially those in the lower classes, who bear the brunt of neoliberal policies.¹⁷ Neoliberalism is therefore as much a juridical project as it is an ideological and political one.¹⁸ Neoliberalism has been a juridical project since its inception, calling for *rule of law* at every turn, and closely monitoring individual property rights and contractual freedoms across the globe. The efficiency of the market, the predictability of market forces, and the promotion of business interests are the main thrusts of this intersection, or what scholars dubbed *neoliberal legality*.¹⁹ Neoliberal legality and concern for rule of law produces the important effect of strengthening legal mechanisms, discourses, and actors, while shaping the ideology and orientation of the law away from the protection of collective rights and public interests, and towards the protection of profit and individual interests.²⁰ Brabazon starts his edited volume on neoliberal legality with a quote from Margaret Thatcher as she sets out to punish labor unions in England in the name of the rule of law. In doing so, the former Prime Minister—popularly known as the Iron Lady—accused unions of representing the “rule of the mob” and promised to ensure that the rule of law would prevail over the rule of the mob, a promise that was soon crystallize in clashes between the police and the miners’ union, leading to multiple deaths and arrests, and ultimately paving the way to crushing one of Britain’s strongest labor unions.²¹ What this example illustrates is the content of neoliberal legality, and its weaponization against collective rights and freedoms in the name of rule of law. In Egypt, for example, the turn to economic and political liberalism, and later neoliberalism in the late 20th century, included the establishment of the SCC in 1979, and with it guarantees of rule of law to foreign investors and businesses and promises of legal protection to capital interests.²² The SCC initially was not meant to oversee cases on rights and freedoms, but rather to guarantee the interest of capital and the private sector. The concern for legality, therefore, is closely connected to the neoliberal project

and the protection of capitalist interest, a trend that has become ubiquitous worldwide, to various degrees. And just like the legal ideology could shift from protecting collective interests to the exclusive promotion of individual interests, the same legality could easily be abused to shrink democratic institutions, undermine rights and freedoms, and consolidate autocratic rule. It is therefore not surprising that the toolkit of autocratic legalism in Egypt included legal reforms to restrict protests, union powers, freedom of speech, as well as undermine elections, media independence and more. This parallels the toolkit of use, abuse, and non-use of law in the service of the executive power in Chavez's Venezuela,²³ and the legalistic toolkits of emerging autocrats laid out by Holgado and Urribarri in Argentina, Ecuador, and Venezuela (2024).

Autocratic Legalism in Action

How does autocratic legalism look like in action? And what legalistic strategies and practices make up the toolkit of emerging autocrats? Scholars have recently pointed to several strategies adopted by various leaders to capture power using legal institutions and rhetoric. These include rewriting constitutions, altering election processes, changing laws and regulations, undermining and controlling legislatures, weakening checks and balances in the country, and capturing judicial institutions through court packing.²⁴ As Scheppele points out, these reforms are possible anywhere in the world, but are particularly common in vulnerable democracies with fragile constitutional systems.²⁵ The fragility of a constitutional system can translate in the ease of rewriting the constitution, the speed of undermining its judiciary, and the scale of resistance to attempts to capture institutions and control publics. In this way, Trump's failure to fully capture the constitutional system in the United States and maintain his presidency is not a function of his lack of trials, but rather of the strength of US institutions. And yet, Trump succeeded in challenging some of the more vulnerable norms in America's constitutional system, for example by attempting to alter the make-up of the SCC. Furthermore, the practice of some of these tools does not necessitate successful democratic backsliding. Some countries may rewrite their constitutions with the goal of strengthening accountability or rights, and like Holgado and Urribarri show, even practices such as court packing might have policy intentions and consequences unrelated to a regime's drive to capture power.²⁶ Therefore, the tools of emerging autocrats need to be analyzed within the context of law-making, institutional reform, and constitutionalism in the respective countries, and should be assessed in terms of political intentions and consequences.²⁷ Another fascinating observation about autocratic legalism is that it is contagious. Autocratic leaders learn from one another. Just like their predecessors of the 20th century copied each other's ideological and military tactics in capturing power, contemporary autocrats learn from one another important lessons about the legalistic tools and strategies of entrenching their autocratic rule.²⁸ Perhaps this learning process was most crystallized when Brazil's President Jair Bolsonaro was elected and overlapped with the United States' Donald Trump. Hailed as the Donald Trump of South America, Bolsonaro shared so many characteristics and strategies with his North American counterpart, from challenging political correctness as an

illiberal agenda of the liberals, to championing traditional families and gender roles, and from supporting militarism and wars, to attacking the media, “fake news” and environmental efforts.²⁹ In other examples, Scheppele shows how Poland’s government learnt from Hungary’s Orbán how to control the constitutional court and launch an attack on ordinary judiciary, a lesson that Orbán himself learnt from Turkey’s Erdogan.³⁰

In the case of Egypt, autocratic legalism was enabled by a fragile constitutional and democratic system that failed to translate the justice and freedom demands of the 2011 Revolution into a solid infrastructure. In fact, the failure of the 2011 revolution to produce a new system was itself the result of a growing autocratic legalism in the country that left the masses unable to challenge the legalistic nature of the political transition. And ultimately, it left the public frustrated with their first democratically elected leader, who attempted to capture political power within months of his election.³¹ Although there are important lessons to draw from Morsi’s short-lived attempt to establish power using the legislature, the judiciary, and the constitution, I focus in this article on the post-2013 state and the strategies of emerging autocracy at the backdrop of a mass revolution. In the following, I start by describing the context of legality in Egypt and its fragile constitutionalism, which enabled the post-2013 military rule that started with a democratic election and ended in a political capture of the legal system, a rewritten constitution, a co-opted judiciary, and a ceremonial parliament. I then lay out the strategies of autocratic legalism, starting from constitutional rewriting and amendments to legislative control and legal reforms, to judicial capture. In the end, I reflect on the outcome: a society ruled by law and neoliberal authoritarianism in the name of majoritarian democracy.

A Revolution Mired in Legality

Egypt has been witnessing a judicialization of politics for several decades, with the SCC providing one unique avenue for successful claims for more democracy and civic space.³² Although the SCC was initially created to help the country attract foreign investments and signal the turn to liberalism, and later neoliberalism, it very quickly became a double-edged sword.³³ The SCC was the outcome of a quick transition from Nasser’s state-led socialism to Sadat’s liberal economic order, which overnight deregulated industries, cut welfare and state spending, and opened up the country to foreign capital.³⁴ The SCC’s role was to provide the legal assurance to foreign capital that Nasser’s policies of nationalizing private capital will never be repeated under a (neo) liberal state in Egypt.³⁵ But the SCC, which was supposed to protect the interests of private capital only, quickly allowed human rights lawyers to litigate on important human rights issues, including torture, the death penalty, political parties, individual freedoms and more.³⁶ Despite its importance to Egyptian politics and society since its inauguration, the SCC was never a fully independent institution. For one thing, the 1971 constitution that the SCC was tasked with protecting was already fragile. It was full of exceptions and gaps, allowing the executive and the legislature to dictate what’s legal and constitutional. The main tool of inserting gaps into the constitution was

adding exceptional clauses such as “in accordance with the law” and “except in the cases specified in the law” to articles of the constitution (Moustafa, 2003, p. 890).³⁷ This strategy of opening up constitutional language to interpretation (more examples from Latin America by Holgado & Urribarri, 2023) was already present in the 1971 constitution, but it played an even more significant role in the post-revolutionary constitution of 2014. In addition, the judges on the SCC, knowing the limits of their independence, avoided clashing with the executive on critical issues. Perhaps one precedent that showcased the weakness of the SCC was its 1980s ruling on the constitutionality of the emergency law and emergency state security courts, in which the court delivered a legally unsound decision in support of the state of emergency and its exceptional courts.³⁸ The intimidation of the judges in general, and the SCC’s judiciary in particular, is another weakness built into the judicial system in Egypt, which maintained ex-president Mubarak in rule for three decades and enabled his successor, al-Sisi, to recapture political power after a nationwide revolution forced Mubarak to abdicate in 2011. Although judicial capture or cooptation is an important strategy of emerging autocrats and I will discuss it in more detail below, it is worth reflecting on how this judicialization of politics enabled the legal system and legal professionals to play the role of experts on the eve of the 2011 Revolution.

The 25th of January Revolution³⁹ was a fascinating 18 days of continued protest taking place nationwide. The leaderless revolutionaries sought to challenge Mubarak’s 30-year rule, rising inequality, and soaring poverty. The slogan of the revolutionaries “bread, freedom and social justice” summed up the comprehensive nature of its demands, and its break-out at the eve of the National Police Day signified the frustration with the police state and its inhumane practices.⁴⁰ But the seemingly radical revolutionary fervor was contained by notions of legality, and driven by a desire to build a country that respects the rule of law. This belief in legality at the eve of the revolution meant that political and transition-related disputes were reframed as legal, judicial, and constitutional problems. The revolution was *reduced* to legal arguments and disputes in front of courts, with the media, activists and the public following its proceedings and outcomes from a distance. And in a country where the public has learnt to distrust corrupt politicians and parliamentarians, judges managed to maintain their reputation as the only neutral and untainted institution in the country.⁴¹ In this way, the transitional period was reduced to a series of legal procedures: a referendum around the continuation of the 1971 constitution or the writing of a new constitution, the law and procedures of electing a new parliament, new laws to address the political isolation of ex-politicians (i.e., to bar ex-National Democratic Party members from running for elections) and a law to specify the make-up of a constitution-drafting committee and the process it shall follow.⁴² Very quickly, opposition parties and activists were absorbed into these legal processes, their political fights were refashioned as fights over legal text, interpretation, and demands for draft laws and new articles in the constitution. Law was viewed as the primary vehicle of translating the revolution and its demands into action. Moustafa (2011) argues that the concern with legality on the eve of the Revolution is a by-product of Mubarak’s “rule-by-law regime,” which has shifted the concern of Egyptians from simply challenging the political leadership, to

challenging the laws and legal institutions underpinning them.⁴³ In this way, radical activists and revolutionaries, who were ready to die protesting Mubarak, suddenly found themselves waiting for legal experts and elite judges to advise on the constitution, new laws, as well as political processes now largely viewed as legal processes.

This concern with legality came at the cost of excluding the masses from the transition and reform processes. The public remained in the waiting room, while the judges and general prosecutor, along with the Supreme Council of Armed Forces (SCAF), steered the political transition. This legalization of politics at this critical moment of transition was consequential to the emergence of autocratic rule. It limited the horizons of change for the public, leaving them in the backseats playing catch-up with the judges, legal experts, and a handful of elite lawyers. This, in turn, brought the military centerstage to the political transition in the name of “constitutional legitimacy.” The moment Mubarak abdicated on February 11, 2011, the military (represented by SCAF) took over the transition, supported by judges and legal experts, who warned that in the absence of legal and political institutions, a *constitutional vacuum* (arabic: *al-faragh al-dusturi*) could threaten the whole nation.⁴⁴ The legal backing of the military in revolutionary times exposed the interweaving of securitization and legality, and the need for legal structures and a legal status group to enforce the security state. This was readily available through the judges, who aided in maintaining the status quo in the country to the extent of finding Mubarak innocent in 2014⁴⁵ thus symbolically de-legitimizing a revolution against him.

When Defense Minister Abdelfattah al-Sisi, in response to sweeping anti-Morsi protests, executed a military coup on July 3rd, 2013, he invited the judges to join his declaration and lend it legitimacy. Not only did Justice Hamid Abd Allah, President of the High Judicial Council (HJC) and Head of the Court of Cassation, attend the declaration, but Chief Justice Adly Mansour of the SCC also agreed to take on the interim presidency as part of the SCAF’s transitional plan, while a new president is elected. In this way, the highest authorities within the judiciary participated in- and enabled the new rule ushered in by the military. Under the judiciary’s watchful eyes, presidential elections were held, and al-Sisi became Egypt’s president in 2014. Swiftly, with the help of his judicial allies and his military backers, he captured power by repurposing legal institutions, including the parliament, courts, and the constitution, to serve his rule.

A New Republic, a New Constitution

Soon after President Morsi was elected to office in 2012, a constitution drafting committee with representative from across the political spectrum worked together on drafting a new constitution. When Morsi’s presidency was abruptly ended by massive street protests, and a military coup in July of 2013, the new constitution drafted and parliament elected were dissolved. Interim-President, Judge Adly Mansour oversaw another constitution-writing process in 2014. Even though the resulting 2014 constitution continued to be in effect to present, it underwent critical amendments in 2019 under al-Sisi’s presidency. Rewriting constitutions is critical strategy in the toolkit of emerging

autocrats because it allows them to redefine what is legal and allowable by repurposing the very source of constitutionality; the constitution itself.⁴⁶ In countries where constitutions are habitually redrafted and repurposed, this becomes a rather swift process that is supported by most of the public. After all, the new constitution will be put to a referendum, so it is a democratic process. What is there to worry about? Certainly a few things were worrying about the constitution from the beginning. First, the 2014 constitution extended the powers of the president in an excessive way, allowing the president for example to appoint 5% of the members of the parliament, constituting 23 members of the 450 parliamentarians.⁴⁷ In addition, the constitution gave exceptional powers to SCAF. Article 204, for example, limited the parliament's authority over the military budget by confining any budgetary discussions or decisions to the military's own National Defense Council. In addition, Article 234 specifies that the appointment of a Minister of Defense can only occur with the endorsement of the SCAF. Perhaps more troubling to the state of civil liberties and human rights, Article 204 allows the military to subject civilians to military courts at its discretion, in cases involving the military. Military trials for civilians have long been opposed by Egyptians but were never enshrined in the constitution, and this stipulation suddenly turned what has been long regarded as unconstitutional to a legal and constitutional reality. So how did this constitution pass the referendum? There are many reasons why most of the participants in the plebiscite said yes to the constitution, which included groundbreaking promises of set budget allocations for education and healthcare that would make up 4% and 3% of the Gross Domestic Production (GDP), respectively. In a neoliberal Egypt with budget cuts, such guarantees were viewed as unparalleled, although the government soon found ways to manipulate the constitutional guarantees of budgetary spending.⁴⁸ In addition, article 64 of the constitution made religious freedom absolute, and not limited to the monotheistic religions, whereas article 11 guaranteed women's right to hold public office and guaranteed their right to be hired to the judiciary, which until recently had been a major struggle. Finally, article 193 protected the independence of the SCC by stipulating that the General Assembly of the Court shall appoint its justice and deputies, and not the president. These advances in constitutional rights made the constitution swallowable for the majority, although most articles continued to include clauses such as "this will be organized by law," "to be regulated by law," and "exemptions will be decided by law," all of which serve to hollow out the constitution. For example, the freedom of religion article hailed as a step forward in the direction of freedom of belief and practice soon became moot because the civil code continued to acknowledge only the Abrahamic religions, and the constitutional article ended with the phrase "as organized by the law."⁴⁹

Al-Sisi was elected president in 2014 and served his first 4-year-term in office, and in 2019 introduced constitutional amendments. The immediate change that he instituted was to extend his tenure as president, from two 4-year-terms to three 6-year terms, thus allowing himself to stay in power double the length of time that the 2014 constitution allowed him.⁵⁰ These legalistic tactics parallel the ones that extended Honduran president Juan Orlando Hernandez's term, when the Honduran Supreme Court voided the single-term limit for the president in 2015.⁵¹ The 2019 constitutional

amendments further strengthened presidentialism and militarism in the country and used the constitution to expand the power of the executive vis-à-vis the legislative and judicial branches. For example, while the 2014 constitution was hailed as protective of judicial independence from presidential interference, the amendments allowed the president to appoint the head judges of Egypt's judicial bodies, thus placing the judiciary's top justices under the president's control.⁵² Similarly, the legislature was altered when the amendments added an upper house of parliament to the existing lower house and allowed the president to appoint 30% of its members, thus diluting the influence of elected parliamentarians (articles 248–254). The constitutional amendments were not passed with an executive order; in fact, al-Sisi was noticeably silent throughout the process. Instead, it is another democratic ballot that led to the new amendments being approved by a majority of voters. So how did the constitutional amendments pass the referendum in April of 2019? The context was critical; five years into al-Sisi's rule, protestors had been punished with arrests, NGOs had been defunded and threatened, and political parties saw their membership dwindle amidst police harassment, while independent media sites had been blocked, and critical journalists laid off from their private media institutions. And then a referendum advertised on a constitution whose articles are not made available to the public at the polling station; constitutional amendments were passed by a public "voting in the dark."⁵³ When the controversial constitutional amendments were announced in 2019,⁵⁴ the judges themselves were too weak to protest. In fact, the Judges club reportedly issued a statement condemning the amendments, then removed it from their website, later denying ever having issued it.⁵⁵

Keeping the Judges in Line

Egyptian judges are not only the elites of the legal profession, but also the trusted elites of the nation.⁵⁶ Judges have maintained their distinction throughout the years by carefully guarding access to their membership and constantly repeating narratives about their independence, and impartiality within the ruling system. The Judges' Club is the judiciary's association and was founded in 1939 as a social club for all judges.⁵⁷ The Judges' Club is open to all current and former judges and its board is elected democratically based on a "one judge-one vote" system. The judiciary's main political demand and ground for mobilization since its inception has been on the issue of judicial independence (*istiqlal al-qada'*). And yet, judges remain far from independent. A closer look at the struggle for independence since the Nasser's offensive against the judiciary in 1969, known as the massacre of the Judiciary,⁵⁸ reveals a struggle for resources and control over the profession, and not a struggle for political independence. In effect, their strive for independence has always come second to their struggle to maintain their privilege and status, leading them to not only ignore problems internal to their profession⁵⁹ but also to accept executive interference in their courts to protect their distinction. Even before 2011, judges have accepted military courts and exceptional judges, which should have been regarded as a slap on the face for any independent judge.⁶⁰ But judges have upheld the status quo and acquiesced to the

existence and growth of these exceptional tribunals to ensure their own survival,⁶¹ a practice that al-Sisi's regime further took advantage of.

Judges are organized within a hierarchical structure that is controlled by three important organizations: The Judges' Club, the HJC and the Ministry of Justice (MoJ). Although the Judges' Club is a judge-only hub, it depends on the MoJ for its finances, leading different governments to punishing judges by slicing their funds.⁶² The HJC also consists of judges, but its board of seven judges are not elected, they are *ex-officio*: they are pulled from judicial positions appointed by the president. The HJC is still considered the legal representative of the judiciary, and must ratify all appointments, firings, disciplinary action, secondments, vacations, and other administrative issues. The MoJ is "the hand of the ruling regime in the judiciary," with the ministry ruling over issues of budgets, medical care, and several important appointments.⁶³ Because of its significance, the HJC became target of al-Sisi, who replaced it with an executive council that he controlled, the Supreme Council of Judicial Bodies (SCJB). Interestingly, the SCJB was first introduced by Nasser in 1969, and then resurrected by al-Sisi in 2019.⁶⁴ Thus, the structure of the judiciary, which was already partially controlled by the executive through the MoJ, progressively became even more constricted by the executive, and particularly by the president. Al-Sisi's constitutional amendments, which exerted presidential control over the leaders of the judiciary became the ultimate tool of coopting the judiciary. This being the case, judges not only accepted the continuing growth of these exceptional tribunals but also agreed to being integrated within them. Judges accepted the operation of new courts within police stations and army camps, in which they would be visitors for several hours every day to read out decisions and leave. The need for additional courts and tribunals has grown in parallel to the rising repression in the aftermath of 2013, and a strive to maintain a rule-by-law.⁶⁵ This means that dissidents are mostly tried in courtrooms, and their death sentences or prison terms are spelled out by a judge, not by a military dictator. This practice of autocratic legalism necessitated the consent of judges, who have the power not only to create effects with words (or rulings), but also to give a sense of neutrality, legitimacy, and legality to these effects. Whether they have discretion over their rulings or not, judges' decisions reproduce the law's unique ability to obtain social consent through its perceived "impartiality and neutrality."⁶⁶ In other words, judges not only produce new realities with their rulings, but in doing so, they also paint these effects as neutral, rational, and legal.

I started this article with the story of the transfer of the Tiran and Sanafir Islands and the resulting legal disputes between 2016 and 2018. The transfer of the Islands in 2016 has resulted in a series of 13 cases in front of various Egyptian Courts, in addition to large-scale demonstrations and mass arrests. All courts ruled against the agreement, and by extension, against the President's will. The courtrooms were filled with ordinary protestors, and the streets in front of the courtrooms witnessed street blockades and chants, the first since al-Sisi came to power in 2014. Two years into the disputes, the SCC overturned all court rulings on grounds of jurisdiction, indicating that the presidential signature and parliamentary ratification is enough to validate the transfer of the islands; thus, ruling that all the other courts did not have jurisdiction in the

first place. The SCC's decision was disputed within the judiciary, but all objections were made to the media *anonymously*⁶⁷ signaling judges' fears of retribution if they were to speak out freely. Judges' fears were not misplaced: judges involved in nullifying the Islands' transfer were punished, either through dismissals and referral to early retirement, or through secondments to less critical roles and more tedious jobs. In fact, even senior Judge El-Dakruri, who issued one critical ruling nullifying the Tiran and Sanafir Islands Agreement, was soon punished by al-Sisi, who ignored his nomination to the Head of the State Council and picked another less senior judge for the prestigious post. The move was largely viewed as a punishment to El-Dakruri for going against the regime's wishes. The Tiran and Sanafir Islands' dispute represented a critical moment for the judges' relationship to the executive: judges' activism came at a high price, not just to the judges who ruled in the various cases pertaining to the islands, but to every judge. The Tiran and Sanafir Islands dispute signified judges' last instance of what some scholars termed *judicial activism*, as al-Sisi started dismissing, transferring, and referring involved judges to early retirement, in what came to be termed a *second judicial massacre*. The control of the judiciary in Egypt looks like modes of control elsewhere, especially in Turkey and Hungary. Judges are not disappeared or tortured, and courts are not shut down or removed. Instead, the appointment, promotion, and firing of justices is interfered with. When a judge is referred to early retirement, it is done following legal process and there is some justification on paper for the misconduct that led to the judge's removal. When a judge is not promoted to a deserved advancement, his health, age, or any minor misconduct is cited to ensure that the punishment looks legitimate. Of course, judicial appointments can take on different forms, with the United States for example having both elections and appointment as modes of selecting judges. In Egypt, judicial appointments depend on the rank of appointment. Although judges and prosecutors in lower ranks are picked by the senior judges of the respective courts and ratified by the HJC, important positions such as the Justices of the SCC and the General Public Prosecutor are appointed by the President from a pool of nominations made by senior judges. The 2019 Constitutional Amendments have impacted appointment processes. They have given the President additional powers to appoint Justices from a *larger* pool of nominees, rather than simply ratifying the SCC nominations, which was the common practice under ex-president Mubarak. In addition, it has reignited the SCJB, which is headed by the President himself.⁶⁸

Ceremonial Law Makers, Symbolic Laws

The functioning of a judicial system in service of an autocracy requires *good* laws. Most of our contemporary autocrats do not want to be viewed as dictators. They were democratically elected, and they like to latch onto the fact that they are elected officials.⁶⁹ Al-Sisi has de facto transformed revolutionary Egypt from a liberal democracy in-the-making, to an electoral autocracy.⁷⁰ When the government decided to evict a poor community on the island of al-Warraaq in the heart of Cairo in 2017 and were met with resistance, including legal challenges, they had the legislature rewrite the urban

communities' law in a way to ensure that a court challenge to the eviction would necessarily be unsuccessful.⁷¹ How did the executive manage to change a critical law on tenure so quickly in the presence of a legislature? The answer lies in legislative capture. As mentioned above, the president had maintained the ability to hire 5% of the parliament and was able to change that number to 30% by 2019 through his constitutional amendments. The legislature is made up of the lower house of parliament, and the upper chamber, the senate, with the house playing the bigger role in passing new laws and the senate playing an advisory role in issuing opinions on legal changes.⁷² Since the election of the first parliament under al-Sisi in 2015, the house has acted as a "rubber stamp to the presidency and the executive branch's wishes," thus helping consolidate its power over the legislature and law-making in the country.⁷³ For example, when parliamentarians first assumed their role in 2015, they had a 2-week deadline to review over 330 laws that were passed by the interim president and al-Sisi since mid-2013. Naturally, these laws were mostly approved.⁷⁴ Even though al-Sisi did not move to ban political parties, except for the Muslim Brotherhood Party, which was outlawed by a court decision, he restricted the funding, freedom of speech, and independence of other political parties. This left formerly influential parties, including the Free Egyptians Party, the Strong Egypt Party, and the Al-Nour Party, almost absent from the legislature. At the same time, a new party was formed by the military intelligence in 2014 to back al-Sisi in power. Even though al-Sisi is not officially affiliated with it, the Nation's Future Party became the largest political party in the country, taking control over both the upper and lower houses of the legislature in two consecutive elections in 2015 and 2020.⁷⁵ To make matters worse, the party has worked with the national security agency to coopt celebrity politicians into its ranks to ensure it maintains majority in the house and the senate, and thus can easily act as the enabler of the autocratic regime.⁷⁶

Conclusion

Egypt's emerging autocracy tells the tale of an autocratic regime that utilizes the rule of law in its illiberal practices by passing repressive laws, punishing dissidents through court sentences, and maintaining its power with claims of electoral legitimacy. This is not to claim that extrajudicial killings and disappearances do not occur in the context of autocratic legalism. In fact, at the same time as legal death penalty sentences have increased in the aftermath of the military take-over in 2013, extrajudicial killings and disappearances were still taking place, often under the guise of the war on terror.⁷⁷ Nevertheless, autocratic legalism stands out particularly because of its ability to punish through the law, and to maintain the face of justice and rule of law. The September 20th protests of 2019 are a case in point: in response to the protests demanding the end to the al-Sisi regime and objecting to neoliberal policies in the country that have inflated prices, stagnated wages, and saw the devaluation of the Egyptian pound,⁷⁸ an unprecedented number of protesters were arrested and faced criminal trials.⁷⁹ The protesters were granted access to public defenders, they were tried in court, and often spent longer periods of time on pre-trial detention on charges of protesting without

permit. It is this ability of the state to police society and dissent, while sticking to law and order, and gain the support of prosecutors and justices in this repressive process that sets autocratic legalism apart from mid-20th century dictatorships. The legal face of autocracy is not unique to Egypt, and it raises important questions about pluralism, liberalism, and freedom. How can constitutionalism be so fragile as to service autocracy? And if the law is the stick of the state, how long will we continue to believe in its impartiality and rationality? The legal system itself has become so precarious, so dependent on the executive branch, and so unpredictable and risky. How long can it maintain its façade of justice and freedom?

Autocratic legalism in Egypt has seriously undermined the transformative potential of the 2011 Revolution. Through a legalistic toolkit, the autocratic regime has effectively reversed the democratic gains of the revolution, while abusing the law to consolidate power, punish the opposition, and limit the possibilities of change. The ideals of rule-of-law, equality, and justice that once ignited hope for an equal society have been overshadowed by a legalistic approach that served to maintain the status quo and perpetuate autocratic rule in an illiberal neoliberal state. As Egyptians navigate their future, they must grapple with the consequences of autocratic legalism on a precarious legal system, captured legal actors, and a disenchanting people. Never has the promise of legality, rule of law, and liberal democracy been put to the test on such a global scale.

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Notes

1. For more information on the court case, and the court opinions, see: Karim Adel Kebaish, "Tiran and Sanafir: A Historical and Constitutional Argument Opposing the Territorial Cession of the Tiran and Sanafir Islands to Saudi Arabia," *Texas Law Review*, Vol. 97, Issue 4. Available at: <https://texaslawreview.org/tiran-sanafir/>
2. The Front for the Defense of Egypt's Protestors (FDEP), a non-profit network of criminal defense and rights lawyers, estimates the number of arrests in connection to the islands at 1,572 nationwide. For more information on the arrests, see FDEP's estimates on Facebook. Available at: <https://www.facebook.com/photo/?fbid=1337995722982389&set=ecnf.100069646879869>
3. Kaldas (2016).
4. Mourad and Ahmed (2017).
5. Brown (2016).
6. There are many other contemporary examples of varying degrees of autocratic legalism, which include both the United States under Donald Trump and Putin's Russia.

7. The National Socialist German Workers' Party (German: *Die Nationalsozialistische Deutsche Arbeiterpartei*) also known as the Nazi Party.
8. For the context and content of the law, see Anne Frank House, "The Enabling Act: even more power for Hitler," Anne Frank: *The entire Timeline*. Available at: <https://www.annefrank.org/en/anne-frank/the-timeline/entire-timeline/>
9. See Corrales (2015), De Sa e Silva (2023), Holgado and Urribarri (2023), and Scheppele (2018).
10. Scheppele, "Autocratic Legalism," 548.
11. Corrales, "Autocratic Legalism in Venezuela," 38.
12. Almeida and Martín, "Collective Resistance," 75.
13. See Almeida and Martín (2022, p. 75), and Khalil and Dill (2018, p. 577).
14. Almeida and Martín, Collective Resistance, 75.
15. Almeida and Martín, Collective Resistance, 75.
16. Harvey (2007, p. 64).
17. Almeida and Martín, Collective Resistance, 5.
18. Brabazon (2016, p. 3).
19. Brabazon, Neoliberal Legality, 7.
20. Brabazon, Neoliberal Legality, 7.
21. Pruitt (2020).
22. Moustafa (2008, p. 5).
23. Corrales, Autocratic Legalism in Venezuela, 40.
24. See Corrales (2015) and Huq and Ginsburg (2017).
25. Scheppele, "Autocratic Legalism," 570.
26. Holgado and Urribarri, "Court packing," 355.
27. Scheppele, "Autocratic Legalism," 369.
28. Scheppele, "Autocratic Legalism," 554.
29. Shear and Haberman (2019).
30. Scheppele, "Autocratic Legalism," 552.
31. Muslim Brotherhood presidential candidate, Mohamed Morsi, won the 2012 presidential elections, which are considered the only free elections Egyptians ever participated in. Despite his short reign in office, Morsi adopted some of the tools of autocratic legalism through measures such as lowering the age of retirement of judges, thus allowing for the hiring of a new generation of judges. See Egypt judiciary crisis: Morsi hints at compromise. (2013). *BBC News*. [online] 28 Apr. Available at: <https://www.bbc.com/news/world-middle-east-22333744> (Accessed 17 Aug. 2023).
32. See Moustafa (2003).
33. Moustafa, "Law versus," 84.
34. Khalil and Dill, "Negotiating," 5.
35. Moustafa, "Law versus," 84.
36. Moustafa, "Law versus," 84.
37. Moustafa, "Law versus," 890.
38. Moustafa, "The Struggle," 96.
39. I am not engaging here with the debate whether the events of January 25th, 2011, qualify as a Revolution. I choose to refer to the events of 2011 as a Revolution in accordance with my own experience of it and the general public's usage of the term.
40. The gruesome murder of a young man from Alexandria at the hands of the police is the spark that ignited the protest in January of 2011.

41. Brown (2005).
42. Khalil (2021).
43. Moustafa (2011).
44. Khalil, "Lawyers," 287.
45. Mourad and Ahmed (2017).
46. de Sa e Silva, "Autocratic Legalism," 425.
47. Buchanan (2014).
48. Kassab and Hindi (2023).
49. <https://www.constituteproject.org> (n.d.).
50. Kaldas (2019).
51. Tegucigalpa, Associated Press in (2015).
52. Kaldas, "Taking Dictatorship"
53. Mamdouh (2019).
54. Tahrir Institute for Middle East Policy (2019).
55. EgyptToday (2019).
56. Brown (2016, p. 103).
57. The Judges did not register the Judges' Club as a formal professional association to not subject it to the control of the Ministry of Social Affairs, which oversees all professional organizations. For a short period in 1999, the Judges' Club was registered as an NGO, thus being subjected to the executive directly, but this move was cancelled by 2000 (Said, 2015).
58. In 1969, Nasser led the first judicial massacre against judges when he dismissed hundreds of seated judges and started micro-managing appointments, secondments, and promotions through the SCJB.
59. El Shazly (2013).
60. Agrama (2012).
61. Agrama, "Questioning," 199.
62. Said (2015, p. 114).
63. Said, "The Role," 113.
64. Al-Ansary et al. (2019).
65. Moustafa and Ginsburg (2010).
66. Bourdieu (1986, p. 810).
67. Mamdouh (2018).
68. Al-Ansari et al, "Q&A."
69. Scheppele, "Autocratic Legalism," 568.
70. de Sa e Silva, "Autocratic Legalism," 426.
71. Khalil (2023, p. 244).
72. Morsy (2021).
73. Morsy, "Egypt's Elections."
74. Morsy, "Egypt's Elections."
75. Kaldas (2021).
76. Kaldas, "Ndpto NFP."
77. Mandour (2019).
78. Alessia and Dentice (2019).
79. "Documentation of Cases of Random Stops and Arrests in the September 20th Events," Egyptian Center for Economic and Social Rights, 2019.

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